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SHALL AN INCOME TAX BE RE-ESTABLISHED?

BY THE HON. GEORGE S. BOUTWELL, FORMERLY SECRETARY OF
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THE war with Spain has given immediate importance to the question of making provision for an Income Tax by the authority of the government of the United States. The vote in the House of Representatives in April last upon an amendment to the bill making provision for the expenses of the war is strong evidence of the disposition of that body to levy such a tax. A change of eleven votes would have secured the adoption of the amendment. The amendment was proposed under very unfavorable circumstances, and in the presence of a recent decision of the Supreme Court by which such an income tax was declared to be in contravention of the Constitution. That vote, and the indications made in other quarters, justify the conclusion that the Democratic party of the country will advocate an income tax as wise partisan policy. There can be no doubt that a large body of Republicans will, upon discussion, favor the measure. It is apparent, also, that the necessity for such a tax is great at the present moment, and that in future times the necessity will be still greater, even though the general condition of the country should be a condition of peace.

From an early period in the history of the contest between free trade and protection in this country, it has been claimed by the friends of protection that the system would increase the product of our manufactures largely, in proportion to the consumption of them by the people, and consequently that the importations from foreign countries of articles which are produced in America would diminish proportionately. This prediction has, in a measure, proved to be a wise one. The customs duties on cheap cotton fabrics, on iron, and on steel have diminished largely, and

in regard to some of the items under those classes the revenue has disappeared altogether. It is, therefore, certain that under the protective system the customs duties in proportion to the population of the country are likely to diminish, while, on the other hand, the total expenditures of the country in proportion to population must increase with every decennial period. The present war with Spain will be followed, probably, by a large addition to our means of coast defense, and not unlikely by a large addition also to our navy.

The opinion of the Supreme Court, in the case of *Pollock vs. Farmers' Loan and Trust Company*, rendered at the October Term, 1894, by a divided Court, declared that an income tax levied directly upon the citizens of the country was unconstitutional, and that the only method by which an income tax could be levied and collected would be by a direct tax upon the States. Such a tax could only be levied upon the States according to the population of each, and without any reference to the ability of the citizens to respond to an income tax. Consequently, it would be in effect a capitation tax, which, if levied, would not be paid, probably, by the poorer States of the Union.

At the opening of the Civil War, Congress imposed a direct tax upon the States of \$20,000,000 in the aggregate. That was a capitation tax, but in form and in fact it was precisely the same as an income tax levied upon the States. Some of the States paid the direct tax of 1861, while in other States the payment was neglected entirely. At the end Congress reimbursed the States that had paid the tax in order that equality might be re-established. From this experience and from the reason of the case it follows that a direct tax upon the States, whether so called, or classed as an income tax, will not be levied, and if levied, could not be collected without great inconvenience to the country, nor without a system of oppression upon the inhabitants of the weaker States that could not be justified.

The attempt made in Congress by the minority to enact an income tax was an unwise proceeding in the presence of the decision of the Supreme Court in the case of *Pollock*. The decision was made by a mere majority of the Court, four members having dissented from the opinion. Since that decision was made there have been two changes in the personnel of the Supreme Court, but the opinions of the new members are not known, nor ought

they to be known. It cannot be presumed that they would act with the former minority, and in any aspect of the decision it is a very unwise proceeding, as a matter of public policy, to invite dissensions in the Supreme Court, and especially is it unwise to place the court in a position where, by a change of membership, it may be called to reverse its former action. Two such occasions have occurred in the history of that tribunal, and a policy ought not to be adopted which invites or furnishes occasion for such reversals of action.

The decision of 1894 opens the way for further unfortunate controversy, and possibly for other unfortunate decisions. By an act of Congress of the year 1794 a duty was imposed upon carriages. The imposition of the duty gave rise to a controversy which is known as the Hylton case. The act of 1794 was opposed by Mr. Madison and by others as an unconstitutional tax, and upon the ground that it was not an excise tax, and that as a direct tax it fell within the scope of the provision of the Constitution, which provides that direct taxes should be levied upon the States and not upon individuals. In the Hylton case the court held that the tax on carriages was an excise tax as distinguished from a direct tax, and that opinion was affirmed in the Pollock case. Inasmuch as that view has been affirmed, the question whether the tax upon carriages is an excise tax or a direct tax may be considered as settled, but the line between a direct tax and an excise tax is very indefinite. If the question were now submitted to a court as a new question it is probable that the court would divide, or an opinion would be rendered contrary to the opinion given in the Hylton case. The contest before the Supreme Court in what are known as the Legal Tender Cases, and the reversal by that court of its first decision after the appointment of two justices had been made, is further evidence of the un wisdom of placing the court unnecessarily in a position where it may either be compelled to decide important questions against the dissent of a large minority, or, as in the Legal Tender Cases, to reverse its original decision.

As the Constitution now reads, and in the light of the decision of the Supreme Court in the case of Pollock, two conclusions are unavoidable—First, that the attempt by Congress to levy an income tax through the States and upon the basis of population cannot be made effective as a practical and practicable

means of raising revenues : Second, that any legislation by Congress in the line of the provision contained in the tariff act of 1894 would lead to further litigation, to be disposed of, finally, by a decision of the Supreme Court.

The limitation in the Constitution by which direct taxes could only be imposed upon the States, and the absence of a description or definition of such taxes, has wrought evil in two directions : First, it has rendered the authority practically valueless, inasmuch as, under that system, any tax levied upon the States would be a capitation tax : and, second, the manifest evil of such a tax is so great that Congress is not likely ever again to provide for the levy and collection of revenues through that agency. The form of government known as the Confederation was created by the States, and its only means of support were to be obtained by a levy of taxes upon the States. The Constitution was established by the people of the United States, and yet the provision of the Constitution in regard to the levy of taxes was derived from the idea which prevailed in the Articles of Confederation. The power to tax is an essential condition of sovereignty in every form of government, and any and every limitation upon the exercise of that power is an encroachment upon the quality or characteristic of government which we call sovereignty.

The Articles of Confederation were framed upon the idea that the government of the United States ought to depend upon the continuing co-operation of the States as independent sovereignties in their relations to each other, and as being superior in their nature to the government of the United States. The Constitution proceeded upon the idea that the people were sovereigns, the creators of the States and the creators of the National Government, and yet the right of the Congress of the United States to exercise the power of taxation upon the people of the United States was limited as compared with the power of the States to levy taxes upon the inhabitants of the respective States. The theory of the preamble can be exemplified in practice only by conferring upon the Congress of the United States power in the matter of taxation equal to that which exists in the several States; that is to say, a power whose limitations are to be found in the manner of the exercise of the power and not in the possession of the power. No objection can be raised to a provision of the Constitution giving such authority to the Congress of the United

States which may not be raised, and with like force, against the existence of the power in the legislatures of the several States. It may be assumed of every legislative assembly in a country where a free ballot exists, that the power to tax will be exercised with the greatest possible reserve. It may be assumed, also, that the Congress of the United States, in levying taxes, will be as free as the legislature of a State from the influences of improper motives. The power of the people to rebuke a Congress is the same in kind, and it may be exercised with equal freedom, as the power of the people of a State to control taxation through the election of their representatives.

In accordance with these views I am of opinion that the Congress of the United States should be authorized to levy taxes upon the persons and property of the inhabitants of the several States and to collect the same, and that the exercise of that authority by Congress should be free of any limitation, even the least. In form I would say : *The Congress of the United States is empowered to levy taxes upon the persons, incomes and properties of the inhabitants of the several States, and to collect the same.*

GEORGE S. BOUTWELL.